

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 JOSEPH ANTONETTI,)
10 Plaintiff,)
11 vs.)
12 HOWARD SKOLNICK, et al.)
13 Defendants.)

3:10-cv-00158-LRH-WGC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

14 This Report and Recommendation is made to the Honorable Larry R. Hicks, Senior United States
15 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.
16 § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Plaintiff's Motion to File
17 Amended/Supplemental and Extended Complaint. (Doc. # 95.)¹ Defendants filed an opposition. (Doc.
18 # 97.)

19 After a thorough review, the court recommends that Plaintiff's motion be denied.

20 **I. BACKGROUND**

21 At all relevant times, Plaintiff Joseph Antonetti was an inmate in custody of the Nevada
22 Department of Corrections (NDOC). (Pl.'s Am. Compl., Doc. # 29 at 1.) The events giving rise to this
23 action took place while Plaintiff was housed at High Desert State Prison (HDSP). The defendants
24 currently named in this action are: Isidro Baca, Charlene Clarkson, Darin Cool, James Cox, Adrian
25 Hendley, James Henson, William Kuloloia, Richard Liverani, Efrain Loan, Cole Morrow, Dwight
26 Neven, Howard Skolnik, and Jeffrey Walker.

27 Plaintiff's original complaint was filed and screened by the court. (*See* Screening Order, Doc.
28

¹ Refers to court's docket number.

1 # 6, and Pl.'s Compl., Doc. # 9.) At a hearing on June 20, 2011, the court granted Plaintiff's oral motion
2 to amend to formally add defendants who were referred to in the body of the original complaint but were
3 not named as defendants. (*See* Doc. # 28.) Thereafter, the court screened Plaintiff's Amended Complaint.
4 (Second Screening Order, Doc. # 32.) The court found that the Amended Complaint did not contain
5 sufficient allegations against the new defendants Plaintiff sought to add. (Doc. # 32 at 2.) The court
6 dismissed those defendants and determined that because the claims in the Amended Complaint were
7 identical to the original complaint, the action would proceed as set forth in the original screening order.
8 (*Id.*)

9 As such, the action was allowed to proceed on the following claims identified in the original
10 screening order: Count 1-Eighth Amendment claim based on medical care and isolation; Count 2-First
11 Amendment access to courts; Count 3-Eighth Amendment conditions of confinement related to personal
12 hygiene; Count 4-Eighth Amendment conditions of confinement related to denial of outdoor exercise;
13 Count 5-First and Fourteenth Amendment claim related to deprivation and confiscation of incoming
14 mail; Count 6-First Amendment claim related to denial of the right to send mail; Count 7-equal
15 protection claim related to being treated differently than other prisoners based on his crime, race,
16 religion, and political beliefs, and due process claim related to the failure to provide periodic review of
17 classification to segregation; Count 9-Fourteenth Amendment due process claim related to the
18 intentional, authorized deprivation of property; Count 10-Eighth Amendment conditions of confinement
19 claim related to the conditions of his cell in segregation; Count 11-First Amendment free exercise of
20 religion; Count 12-Eighth Amendment conditions of confinement claim related to food provided to him
21 at HDSP; Count 13-Fourth Amendment claim based on an alleged unreasonable search and Eighth
22 Amendment claim related to a search allegedly intended to harass; Count 14-Fourteenth Amendment
23 due process claim related to the intentional, authorized deprivation of property when Plaintiff leaves his
24 cell; Count 15-Eighth Amendment conditions of confinement and Fourteenth Amendment due process
25 claims related to housing in segregation; Count 16-equal protection claim related to being treated
26 differently than inmates with similar convictions and sentences with respect to classification to
27 maximum custody; Count 17-Eighth Amendment conditions of confinement claim related to the right
28

1 to exercise; Count 18-Eighth Amendment claim regarding the risk of harm related to having to walk
2 great distances in restraints; Count 20-First Amendment retaliation claim; and Count 24-Fourteenth
3 Amendment due process claim related to the intentional, authorized deprivation of property. (Doc. # 6.)
4 Counts 8, 19, 21, 22, 23 and 25 were dismissed on screening. (*Id.*)

5 Defendants subsequently filed a partial motion to dismiss, seeking dismissal of Counts 1, 3, 4,
6 7, 12, 13, 15, 16 and 17 on the basis that they were duplicitous of claims asserted in *Antonetti v. Nevin*,
7 2:08-cv-01020-KJD-VCF. (Doc. # 40.) The court issued a report and recommendation to grant in part
8 and deny in part Defendants' motion (Doc. # 53), which was adopted by the district court (Doc. # 57).
9 The result is that Counts 1, 4, 7, 12, 13, 15, 16 and 17 were dismissed with prejudice as to defendants
10 Baca, Cox, Henson, Kuloloia, Neven, Skolnik and Walker. (*Id.*)

11 Plaintiff has since filed the instant motion, requesting leave to amend his complaint. The
12 proposed amended complaint is set forth at Doc. # 95-1. In addition to the currently named defendants,
13 Plaintiff seeks to add defendants whom were previously dismissed: Marshall, Wuest, Graham, Deal,
14 Smith, Sablica, and Hoover. (*See* Doc. # 32 at 2.) In addition, Plaintiff seeks to add, as best as the court
15 can ascertain, some twenty-one new defendants: Ritz, Helling, McDaniels, Dreeson, Nash, Howell,
16 Connett, Foster, Fletcher, Roberson, Treadwell, Cool, Evangelista, Menendez, Valdez, Capper, Hooper,
17 Shields, Ervin, Walker and the Nevada Prison Commission. The proposed amended complaint sets forth
18 nineteen causes of action.

19 In his motion, Plaintiff mentions that he previously sought an extension of the discovery and
20 amendment deadlines, and an extension of the discovery was granted, but there was no corresponding
21 extension of the deadline to seek amendment of the pleadings. (Doc. # 95 at 1.) He now wishes to
22 amend his complaint to add parties, successors, as well as doe defendants, and to more clearly articulate
23 his claims. (*Id.* at 2.)

24 Defendants have opposed Plaintiff's motion, arguing that allowing Plaintiff to amend his
25 pleading to add parties and expand the time line of claims would result in prejudice to Defendants, who
26 have now filed a dispositive motion. (Doc. # 97 at 2.) Defendants also claim that amendment would be
27 futile because many of the claims submitted in the proposed amended pleading are substantially identical
28

1 to those that survived screening (Counts I to XVII of the proposed amended complaint) as well as to
2 those that were previously dismissed on screening (Counts XVIII-XX of the proposed amended
3 complaint) . (*Id.*)

4 **II. LEGAL STANDARD**

5 “A party may amend its pleading once as a matter of course within: (A) 21 days after serving
6 it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a
7 responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is
8 earlier.” Fed. R. Civ. P. 15(a). Otherwise, a party must seek leave of court to amend a pleading. Fed.
9 R. Civ. P. 15(a)(2).

10 While the court should freely give leave to amend when justice requires, leave need not be
11 granted where amendment: “(1) prejudices the opposing party; (2) is sought in bad faith; (3) produces
12 an undue delay in litigation; or (4) is futile.” *Amerisource Bergen Corp. v. Dialysist West, Inc.*, 465 F.3d
13 946, 951 (9th Cir. 2006) (citation omitted). Thus, leave to amend may be denied if the proposed
14 amendment is futile or would be subject to dismissal. *Carrico v. City & County of San Francisco*, 656
15 F.3d 1002, 1008 (9th Cir. 2011).

16 “When the district court has filed a Rule 16 scheduling order, it may properly require that good
17 cause be shown for leave to file an amended pleading that is substantially out of time under that order.”
18 *Rainy Lake One Stop, Inc. v. Marigold Foods, Inc.*, 529 U.S. 1038 (2000); *see also Byrd v. Guess*, 137
19 F.3d 1126, 1131-32 (9th Cir. 1998) (“Once the district court enters a scheduling order setting forth a
20 deadline for the amendment of pleadings, modifications are allowed only upon a showing of ‘good
21 cause’...And once a pretrial order has been entered pursuant to Rule 16(e) setting forth the parties and
22 issues for trial, modifications are allowed ‘only to prevent manifest injustice.’”).

23 **III. ANALYSIS**

24 The original scheduling order in this matter was entered on August 31, 2012. (Doc. # 59.)
25 Pursuant to its terms, any motion for leave to amend a pleading was to be brought on or before
26 October 30, 2012. (*Id.*) On January 25, 2013, Plaintiff filed a motion requesting to amend the scheduling
27 order. (Doc. # 84.) This was filed nearly three months after the deadline to seek leave to amend a
28

1 pleading had passed. The motion itself focused around the discovery deadline and Plaintiff's need to
2 obtain and review discovery responses and to serve additional discovery. (Doc. # 84.) Defendants did
3 not oppose Plaintiff's motion. (Doc. # 86.) Notably absent from the motion was any request to extend
4 the deadline for amendment of pleadings. The court granted Plaintiff's motion, extending the discovery
5 deadline in this matter to April 7, 2013, the discovery motion deadline to April 22, 2013, the dispositive
6 motion deadline to May 22, 2013, and the deadline for filing a joint pretrial order to June 21, 2013
7 (unless a dispositive motion is filed, and in that case, to thirty days after a decision is rendered on the
8 dispositive motion). (Doc. # 87.) At that time, the court stated, in bold and all capital letters: "**THERE**
9 **SHALL BE NO FURTHER EXTENSIONS.**" (*Id.*)

10 The order did not contain a new deadline for amending the pleadings. Although not set forth
11 specifically in the court's order, the reason for this was the fact that the deadline for amendment had
12 passed long before Plaintiff filed his motion for an extension, which only referenced the discovery
13 deadline. Additionally, Plaintiff had previously sought to amend the action, unsuccessfully (Doc. # 32),
14 and this case has been pending since 2010. Moreover, the court addressed Plaintiff's proposition of
15 amending the scheduling order to amend his complaint or add parties, and at that time denied Plaintiff's
16 then pending motion to extend time to amend the complaint. (*See* Doc. # 33, Doc. # 82.)

17 The scheduling order itself provides that for any motion to amend the scheduling order filed
18 outside the parameters outlined therein, the moving party must show good cause. Plaintiff has not made
19 a good cause showing or otherwise explained why he has waited until this late juncture to seek
20 amendment of the complaint. Instead, he has filed a proposed amended complaint which includes claims
21 that are substantially identical to those already encompassed within this action, with additional parties
22 whose connection to the alleged constitutional violations Plaintiff does not adequately explain (Counts
23 I to XVII of the proposed amended complaint). (Doc. # 95-1.) In addition, he seeks to re-assert claims
24 that were previously dismissed by the court without curing the deficiencies identified by the court
25 (Counts XVIII to XX of the proposed amended complaint). (*Id.*) Defendants represent that they have
26 engaged in substantial discovery, producing a voluminous amount of documentation to Plaintiff, and
27 have filed a partial motion to dismiss and motion for partial summary judgment (Doc. # 109).

1 The court finds Plaintiff has not established good cause to support his request for an amendment
2 outside the parameters of the scheduling order. Moreover, the court finds, for the reasons stated above,
3 that amendment would prejudice Defendants, would produce an undue delay in this litigation which has
4 been pending since 2010, and is futile. Therefore, the court recommends that Plaintiff's motion
5 requesting leave to amend his complaint be denied.

6 **IV. RECOMMENDATION**

7 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order **DENYING**
8 Plaintiff's Motion to File Amended/Supplemental and Extended Complaint (Doc. # 95) **WITH**
9 **PREJUDICE.**

10 The parties should be aware of the following:

11 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local
12 Rules of Practice, specific written objections to this Report and Recommendation within fourteen (14)
13 days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and
14 Recommendation" and should be accompanied by points and authorities for consideration by the District
15 Court.

16 2. That this Report and Recommendation is not an appealable order and that any notice of
17 appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court's
18 judgment.

19 DATED: August 5, 2013

20 
21

WILLIAM G. COBB
22 UNITED STATES MAGISTRATE JUDGE
23
24
25
26
27
28